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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 292

ACME SPECIALTIES CORP., an Illinois Corp.,
Petitioner.

vs.

JOSEPH BIBB, Director of the Department of Public Safety, and
LATHAM CASTLE, Attorney General, State of Illinois,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

CERTIFICATE OF SERVICE APPENDED.

LATHAM CASTLE,
Attorney General of the State of Illinois,
160 N. La Salle Street, Suite 900,
Chicago 1, Illinois (FI 6-2000)
Counsel for Respondents.

WILLIAM C. WINES,
Assistant Attorney General.
Of Counsel.

Printed by authority of the State of Illinois

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STATEMENT OF THE CASE.

Page references are to the abstract filed in the Illinois Supreme Court, respondents not having been served with any record printed in this Court.

Petitioner sought a judgment declaratory of the 1957 provision of the Illinois Fireworks Act prohibiting the sale or use of sparklers except in connection with "supervised public displays" deprives petitioner, a manufacturer of

sparklers, of its business and property without due process of law, the complaint charging that the Act was unreasonable and confiscatory. (Abst. 1-16.) The trial court dismissed the plaintiff's complaint on the motion of the defendants, the Director of Public Safety and the Attorney General of Illinois. (Abst. 19.) The Supreme Court of Illinois held the Act reasonable and constitutional and affirmed the trial court's decision. (*Opinion, Petitioner's Brief, App. A.* 2a-3a, Opinion reported 13 Ill. 2d 516.)

The substance of the Federal questions decided by the Illinois Supreme Court appear in that Court's opinion and are correctly stated in petitioner's brief.

Petitioner's assertion that sparklers are "harmless" is petitioner's conclusion, with which the respondents, the trial court and the Supreme Court of Illinois disagree.

ARGUMENT.

I.

SPARKLERS ARE SO DANGEROUS, ESPECIALLY TO SMALL CHILDREN AND OF SUCH "MINIMAL USEFULNESS" THAT DUE PROCESS IS NOT DENIED BY THE PROHIBITION OF THEIR SALE OR USE EXCEPT AT "SUPERVISED PUBLIC DISPLAYS." THE ILLINOIS STATE LEGISLATURE DID NOT DENY DUE PROCESS BY DEEMING REGULATION AN INADEQUATE ALTERNATIVE TO SUCH PROHIBITION. THIS IS TRUE EVEN THOUGH THE VIRTUAL EFFECT OF THE PROHIBITION IS TO SUPPRESS THE PLAINTIFF'S BUSINESS.

The Court will take judicial notice that sparklers when lighted are wires heated to such a degree of incandescence as will ignite any ordinarily flammable material, such as clothing, and as will burn the hands, eyes, or the body of any human being who comes in contact with the heated core.

The Court will also take judicial notice that sparklers are very generally used by small children and that many injuries and deaths are the tragic consequences of children's use of these highly dangerous playthings.

The Court will also take judicial notice of the "minimal usefulness; weighed against their capacity for causing harm" of which the Supreme Court of Illinois speaks in its opinion in the instant case. (*Petitioner's Brief*, Appendix A, p. 3-a.).

Although the peril from fires ignited by sparklers is, as the Supreme Court noted, "particularly to small children,"

the danger is not confined to children alone. Even if it were so confined, the certainty that sparklers will fall into the hands of children even though children should be prohibited from purchasing or using them is a matter that must be judicially noticed. Adults and older children will supply younger children with sparklers despite statutory prohibitions. Injuries and deaths result from children's use of sparklers whether such use is or is not lawful.

Petitioner will doubtless reply, as it did in the Supreme Court of Illinois, that other commodities relatively safe in the hands of adults are dangerous in the hands of small children. But such commodities, such as matches, automobiles, dangerous electrical and other appliances and the like, unlike sparklers, are not articles or materials of "minimal usefulness". They are in general essential or at least highly useful amenities of our present civilization. If there exist other commodities that are absolutely certain to kill some small children and seriously to injure other children and are of no more use to our society than are sparklers and if, as is the case with sparklers, no feasible means exists of preventing children from access to such articles or materials, the sale, use or even the manufacture of such articles may likewise be constitutionally interdicted.

Petitioner's argument that "regulation would have accomplished the avowed purpose of the legislature" is arrantly unrealistic. Petitioner suggests no feasible means of keeping sparklers from small children if those articles are sold or used by the adult and adolescent public.

Petitioner says, "Pyrotechnic composition of sparklers could be restricted; size and weight could be regulated; time of sale could be confined." *(Petitioner's Brief*, p. 12.)

But *any* sparkler, despite its "pyrotechnic composition", when lighted, is, by petitioner's own definition of the term "sparkler", "a wire, partly coated with a composition,

which, when ignited, it emits sparks as it burns, and as it burns consumes itself." Any wire that burns hotly enough to consume itself is capable of burning a child or igniting his raiment. The size and weight of the wire could indeed be regulated but not by any measures that would prevent the wire from setting fire to a child.

The "time of sale" could of course be "defined". But the time of sale has nothing whatever to do with the dangerous character of sparklers. If sparklers are dangerous on Christmas day, they are dangerous on the Fourth of July.

The State may prohibit any traffic in commodities that the General Assembly reasonably deems dangerous to public health. In *Austin* v. *Tennessee*, 179 U. S. 343, this Court sustained an Act prohibiting the selling, giving away or otherwise disposing of cigarettes. Similarly, it was held that states might prohibit the sale of intoxicating liquors even before the Eighteenth Amendment. *Mugler* v. *Kansas*, 123 U. S. 623, *Kidd* v. *Pearson*, 128 U. S. 1.

The Act exempts from its provisions the sale of sparklers for and their use in "supervised public displays." (Ill. Rev. Stats. 1957, Ch. 38, Par. 28 Vol. I, p. 1572, Petitioner's Brief, p. 9 a.) This exemption is reasonable. Use of sparklers except under public supervision is inherently dangerous to children and may reasonably be prohibited. Indeed, the exemption, although reasonable, would not be necessary to the validity of the Act; for the danger of sparklers to children is so great that a legislature may reasonably declare them absolutely contraband.

The prohibition of sparklers has been sponsored in Illinois and generally throughout the United States by societies for the prevention of blindness and other civic organizations informed as to the hazards of sparklers and other fireworks and dedicated to the abolition of those hazards. The legislation is constitutional.

II.

IT IS OF NO MOMENT THAT THE ACT DEPRECIATES PETITIONER'S PROPERTY WITHOUT COMPENSATION.

Where the business may be prohibited or a commodity made contraband by the exercise of a state's police power, the prohibition may be applied to those who have at the time of enactment substantial capital invested in plants for the operation of business or the manufacture of the interdicted article. In *Austin* v. *Tennessee*, 179 U. S. 343, this Court, citing *Mugler* v. *Kansas*, 123 U. S. 623, and *Kidd* v. *Pearson*, 128 U. S. 1, declared that measures suppressing traffic in articles rendered illicit by their enactment "might be enforced against persons who, at the time, happen to own property whose value consisted in its fitness for manufacturing" such articles.

III.

IT IS OF NO CONSEQUENCE THAT THE SALE AND USE OF SPARKLERS WAS "EXPRESSLY SANCTIONED" BY THE ILLINOIS FIREWORKS ACT PRIOR TO THE ENACTMENT OF THE AMENDMENT ASSAILED IN THIS CASE.

Petitioner contends that the fact that the General Assembly exempted sparklers from the regulations and prohibitions of earlier fireworks acts vests in petitioner a constitutional right to continue its business of selling sparklers directly or indirectly to the general public although the legislature of Illinois now deems sparklers to be so dangerous that their use should be restricted to "supervised public displays". Petitioner says, "Certainly a citizen has a right

to rely upon statutory pronouncement. Certainly, he has a right to expect that any investment made in reliance upon statutory pronouncement will be protected in so far as circumstances remain the same." (*Petitioner's Brief*, p. 14.) Petitioner cites no authority sustaining this contention and where the police power is exerted, no such authority has been found.

There is no vested right, as the result of prior statutes or otherwise, to continue a business that is injurious to the public welfare. Such business may be prohibited or destroyed without compensation. *Brand* v. *Union Elevated R. R. Co.*, 238 U. S. 586, sustaining the validity of an ordinance whose effect was to destroy without compensation the utility of railroad property that was dangerous to the public. *Beer Co.* v. *Massachusetts* 97 U. S. 25, sustaining legislation destructive of a brewery company's business although the brewery had an antecedent charter by act of the legislature.

It is of no consequence that sparklers are no more dangerous now than they ever were and may even be safer. The legislature may take cognizance of long existing evils and prohibit their continuance. Most of the modern health and safety measures would be unconstitutional as applied to established businesses if petitioner's contention had merit. See *Williams* v. *Lee Optical Co.*, 348 U. S. 483, sustaining legislation that prohibited anyone other than a licensed optometrist or ophthalmologist to fit lenses to a face or to deflect or to replace into lenses or other optical appliances except upon a written prescription by a licensed optometrist or ophthalmologist.

IV.

REPLY TO SUNDRY CONTENTIONS AND SUGGESTIONS.

No federal constitutional question is raised by petitioner's suggestions that sparklers are not "fireworks" and were not so deemed in earlier acts of the Illinois legislature. The intent of the legislature is clear that the sale or use of sparklers except at "supervised public displays" is prohibited, whether sparklers are fireworks or not. No federal question is raised by the contention that sparklers are not fireworks. Whether they are fireworks or not, they are dangerous.

Nor is it important that the Interstate Commerce Commission has not in a particular regulation deemed sparklers "the composition of which does not exceed 100 grams each and which contain no magnesium or magnesium and a chlorate or perchlorate are not subject to the regulations". (See *Petitioner's Brief*, p. 15.)

Petitioner's assertion that "the sparklers manufactured by petitioner are safe, useful and in no way implicitly or intrinsically dangerous or harmful" is a conclusion that is at variance with the determination of the Illinois legislature. That determination is reasonable and therefore constitutional.

Petitioner seeks the right to continue to burn, blind and otherwise injure children. Due process of law does not protect this right.

V.

THE QUESTIONS RAISED BY PETITIONER ARE NOT SO FAR FAIRLY DEBATABLE AS TO ELICIT CERTIORARI.

Sparklers are so clearly dangerous to children and it is so far self-evident that the legislature may reasonably forbear their use or sale except at "supervised public displays", that no occasion exists for the granting of *certiorari* in this case.

Petitioner has seen fit to forbear its right of appeal as distinguished from *certiorari* in this case, which right would have existed if the question of the constitutionality of the instant measure were fairly debatable, under Section 1257 (2) of the Judicial Code. (28 U.S.C.A., Sec. 1257(2).)

Conclusion.

For reasons suggested in this brief, it is respectfully submitted that *certiorari* in this case should be denied.

Respectfully submitted,

LATHAM CASTLE,
Attorney General of the State of Illinois,
160 N. La Salle Street, Suite 900,
Chicago 1, Illinois.
Counsel for Respondents.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

CERTIFICATE OF SERVICE PROOF.

I, William C. Wines, a member of the bar of this Court and an Assistant Attorney General of the State of Illinois, hereby certify that on the 12th day of September, 1958, I served five copies of the above Brief in Opposition to Petition for a Writ of Certiorari on James C. Murray, by mailing the same to him, sufficient postage prepaid, at his address of record, 111 W. Washington Street, Chicago, Illinois, and five copies of the said brief on Erwin N. Greenberg, 120 S. La Salle St., Chicago, Illinois.

WILLIAM C. WINES,
Assistant Attorney General of the State of Illinois.